Bright Rims Manufacturing Sdn Bhd v Victor Taichung Machinery Works Co Ltd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–779 OF 2003
DENIS ONG, MOHD GHAZALI AND ARIFFIN JAKA JJCA
29 MAY 2007

Civil Procedure — Mareva injunction — Principles — Action premised on malicious prosecution — Claim for loss and damage — Whether real risk of dissipation of assets shown — Whether appellate interference warranted

Tort — Malicious prosecution — Execution of summary judgment — Claim for loss and damage suffered as a result of execution proceedings — Quantification of damages for purposes of injunction — Whether damages suffered ought to be established — Whether legal costs have to be taxed

The appellant filed an action against the first and second respondent for loss and damage suffered as a result of malicious prosecution which has yet to be heard. It was the appellant's claim that as a result of certain actions by the first and second respondents arising out of another civil suit, namely, Kuala Lumpur High Court Civil Suit No D5–22–425 of 1996 ('the D5 suit') wherein the appellant was named as one of the defendants, its reputation had been harmed, its credit seriously damaged and its business transactions hampered and hence had suffered loss and damage. The appellant claimed for special damages totaling RM1,540,450 and the sum of RM6m as general damages and/or aggravated damages, interest and costs. The first and second respondents filed a joint defence disputing the appellant's claim. On 21 March 2003, the appellant filed an ex parte application for Mareva injunction against the first respondent, a foreign company (encl 7) to restrain the first respondent from removing from jurisdiction, disposing of or otherwise dealing with in any manner sum of RM1,540,450 within the jurisdiction until the inter partes hearing of the application on a date to be fixed or until further order. Enclosure 7 was heard by the learned judicial commissioner ('JC') in the court below on an inter partes basis and was dismissed on the grounds that the appellant had failed to show that that the proceedings, viz, the said petition and the said writ of seizure and sale in the D5 suit was decided in the appellant's favour or that the first respondent brought or continued the proceedings in the D5 suit without reasonable and probable cause; and that first respondent had maliciously instituted the

proceedings. The learned JC held that the first respondent was entitled to pursue the said petition and the said writ of seizure and sale in the D5 suit, on the basis that the said stay of execution abated when the court disposed of the counterclaim appeal by the appellant. The learned JC also found that the appellant had failed to show that there was a real risk of the first respondent's assets being dissipated or removed before this instant action was disposed of. Hence this appeal.

Held, dismissing the appeal with costs:

(1) On the facts, the first respondent had every right to file the said petition to wind up the appellant based upon the said summary judgment awarded against the appellant. The said summary judgment was clearly a final judgment. As such, the appellant's stand that the learned JC failed to appreciate that the appellant had a strong arguable case to claim for damages against the first respondent following the dismissal of the said petition could not be appreciated (see para 50).

(2) Further, there were no merits in the ground advanced by the appellant that the learned JC failed to consider adequately that the said petition, even if it were to be subsequently dismissed as being ill-founded, could damage the reputation of the appellant as a solvent company. The appellant would be entitled to damages if it could prove at the trial of the instant action that there was indeed malicious prosecution on the part of the first respondent in presenting the said petition. But until the instant action was heard on its merits, the learned JC would not be able to determine at this interlocutory stage that the presentation of the said petition was, from its very nature, calculated to injure the credit of the appellant, thus entitling it to damages for pecuniary loss or special damages or loss of business (see para 51).

(3) It could not be disputed that the appellant had every right to file this instant action premised on malicious prosecution and in relation to this, the appellant took the correct approach as had been established from the authorities, namely, that any action for damages against a petitioner, whose petition for winding up has been struck out can be brought by an entirely separate suit founded on a tort of malicious prosecution (see *Si & Si Sdn Bhd v Hazrabina Sdn Bhd* [1996] 2 MLJ 509). However, the issue of how much loss had been suffered could only be determined at the trial. In this application for Mareva injunction, the sum that the appellant was asking the court to injunct was RM1,540,450, but the appellant failed to produce any evidence at all to prove that it had suffered loss of RM1,490,450, ie, the purported expenses for advertisements and its legal costs in opposing the said petition. As such, it would only tantamount to being a bare allegation.

The fact that the loss was claimed as special damages would suggest that the appellant should have all the necessary evidence to prove this amount but the appellant failed to illustrate this when it pursued this application (see para 52).

(4) The appellant's argument that unless restrained, there was a real danger that the first respondent, being a foreign company, would remove from the jurisdiction the said judgment sum and this would render nugatory any order which the court may order against the first respondent had no merit in it. This was because, the appellant had not shown that there was a risk that the assets of the first respondent, including the judgment sum would be dissipated (see para 54).

(5) Upon careful perusal of the appeal record and the grounds of decision of the learned JC, she had taken into consideration all the facts and the legal principles involved in an application for Mareva injunction. She had weighed all the relevant factors and came to the conclusion that the balance of convenience lay in favour of refusing the Mareva injunction. Thus, she had exercised her discretion judiciously and in accordance with the settled principles in dismissing this application for Mareva injunction. As such there was no reason for the court to interfere (see para 56).

[Bahasa Malaysia summary

Perayu memfailkan tindakan terhadap responden pertama dan kedua untuk kerugian dan kerosakan yang dialami akibat daripada pendakwaan niat jahat yang masih belum didengar. Ia adalah tuntutan perayu bahawa akibat daripada tindakan tertentu oleh responden pertama dan kedua berbangkit daripada tindakan sivil yang satu lagi, iaitu, Mahkamah Tinggi Kuala Lumpur Guaman Sivil No D5–22–425 Tahun 1996 ('guaman D5') di mana perayu dinamakan sebagai salah seorang daripada defendan, reputasinya telah dirosakkan, kreditnya musnah secara serius dan transaksi perniagaannya dihalang dan oleh itu telah mengalami kerugian dan kerosakan. Perayu menuntut ganti rugi khas berjumlah RM1,540,450 dan sejumlah RM6 juta sebagai ganti rugi am dan/atau ganti rugi tambahan, faedah dan kos. Responden pertama dan kedua memfailkan pembelaan bersama mempertikaikan tuntutan perayu. Pada 21 Mac 2003, perayu memfailkan permohonan ex parte untuk injunksi Mareva terhadap responden pertama, sebuah syarikat asing (lampiran 7) untuk menghalang responden pertama daripada mengeluarkan dari bidang kuasa, melupuskan atau sebaliknya berurusan dengan apa-apa cara RM1,540,450 di dalam bidang kuasa sehingga pendengaran inter partes permohonan pada tarikh yang akan ditetapkan atau sehingga perintah selanjutnya. Lampiran 7 didengar oleh pesuruhjaya kehakiman yang bijaksana ('PK') di Mahkamah Tinggi atas dasar

A inter partes dan ditolak atas alasan bahawa perayu telah gagal untuk menunjukkan bahawa prosiding tersebut, viz, petisyen tersebut and writ perampasan dan jualan tersebut di dalam tindakan D5 diputuskan memihak perayu atau bahawa responden pertama mengambil atau meneruskan prosiding di dalam tindakan D5 tanpa sebab yang munasabah dan mungkin;
B dan responden pertama telah dengan niat jahat memulakan prosiding tersebut. PK yang bijaksana memutuskan bahawa responden pertama berhak untuk meneruskan petisyen tersebut dan writ perampasan dan jualan di dalam tindakan D5, atas asas bahawa penangguhan pelaksanaan tersebut berkurangan apabila mahkamah mematahkan rayuan tuntutan balas oleh
C perayu. PK yang bijaksana mendapati bahawa perayu juga gagal untuk menunjukkan bahawa terdapat risiko aset responden pertama dilesapkan atau dikeluarkan sebelum tindakan ini diputuskan. Maka rayuan ini.

D **Diputuskan**, menolak rayuan dengan kos:

(1) Atas fakta, responden pertama mempunyai hak untuk memfailkan petisyen untuk menggulung perayu berdasarkan penghakiman terus yang diawardkan terhadap perayu. Penghakiman terus jelas adalah
E penghakiman muktamad. Oleh itu pendirian perayu bahawa PK yang bijaksana gagal untuk menerima bahawa perayu mempunyai kes yang kukuh untuk menuntut ganti rugi terhadap responden pertama berikutan penolakan petisyen tersebut tidak boleh diterima (lihat perenggan 50).

F (2) Selanjutnya, tidak terdapat merit di dalam alasan yang dikemukakan oleh perayu bahawa PK yang bijaksana gagal untuk mempertimbangkan dengan secukupnya petisyen tersebut, jikapun ia kemudiannya ditolak kerana ketiadaan asas, boleh merosakkan reputasi
G perayu sebagai syarikat yang solven. Perayu akan berhak kepada ganti rugi jika ia dapat membuktikan semasa perbicaraan tindakan ini bahawa memang terdapat pendakwaan niat jahat oleh responden pertama di dalam mengemukakan petisyen tersebut. Tetapi sehingga tindakan ini didengar atas meritnya, PK yang bijaksana tidak dapat
H menentukan pada peringkat interlokutari ini bahawa pengemukaan petisyen tersebut adalah daripada sifatnya, bertujuan untuk merosakkan nama baik perayu, oleh itu mewajarkannya untuk ganti rugi terhadap kehilangan kewangan atau ganti rugi khas atau kehilangan perniagaan (lihat perenggan 51).

I (3) Ia tidak dipertikaikan bahawa perayu mempunyai segala hak untuk memfailkan tindakan ini berasaskan pendakwaan niat jahat dan sehubungan ini, perayu telah mengambil pendekatan yang betul seperti yang ditetapkan oleh autoriti-autoriti, iaitu, bahawa apa-apa tindakan untuk ganti rugi terhadap pempetisyen, yang petisyennya untuk

menggulung telah dibatalkan boleh diambil melalui satu guaman berasingan berasaskan tort pendakwaan niat jahat (lihat *Si & Si Sdn Bhd v Hazrabina Sdn Bhd* [1996] 2 MLJ 509). Walau bagaimanapun isu mengenai berapa banyak kerugian yang dialami hanya boleh ditentukan semasa perbicaraan. Dalam permohonan untuk injunksi Mareva ini, jumlah yang perayu memohon untuk diinjunk oleh mahkamah adalah RM1,540,450, tetapi perayu gagal mengemukakan apa-apa keterangan untuk membuktikan bahawa ia mengalami kerugian sebanyak RM1,490,450, iaitu, perbelanjaan untuk pengiklanan dan kos guamannya di dalam menentang petisyen tersebut. Oleh itu, ia sama seperti dakwaan kosong semata-mata. Fakta bahawa kerugian dituntut sebagai ganti rugi khas menunjukkan bahawa perayu patut mempunyai kesemua keterangan yang perlu untuk membuktikan jumlah ini tetapi perayu gagal untuk menunjukkannya apabila ia meneruskan permohonan ini (lihat perenggan 52).

(4) Hujahan perayu bahawa terdapat bahaya yang sebenar bahawa responden pertama, sebagai syarikat asing, kecuali dihalang, akan mengeluarkan jumlah penghakiman tersebut dari bidang kuasa dan ini akan menyebabkan sia-sia apa-apa perintah yang mungkin dibuat oleh mahkamah terhadap responden pertama, adalah tidak bermerit. Ini adalah kerana, perayu tidak menunjukkan bahawa terdapat risiko bahawa aset responden pertama, termasuk jumlah penghakiman akan dilesapkan (lihat perenggan 54).

(5) Atas penelitian terperinci rekod rayuan dan alasan-alasan keputusan PK yang bijaksana, beliau telah mempertimbangkan kesemua fakta dan prinsip undang-undang yang terlibat di dalam permohonan untuk injunksi Mareva. Beliau telah mempertimbangkan kesemua fakta relevan dan mencapai keputusan bahawa imbangan kesenangan memihak kepada penolakan injunksi Mareva. Oleh itu, beliau telah melaksanakan budi bicaranya secara kehakiman dan mengikut prinsip-prinsip yang ditetapkan di dalam menilai permohonan ini untuk injunksi Mareva. Oleh itu, tidak terdapat alasan untuk mahkamah campur tangan (lihat perenggan 56).]

Notes

For cases on malicious prosecution in general, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 688–705

For cases on Mareva injunction in general, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4742–4781

Cases referred to

Creative Furnishing Sdn Bhd v Wong Koi [1989] 2 MLJ 153 (refd)

QIW Retailers Ltd v Felview Pty Ltd & Anor (1989) 7 ACLC 510 (refd)

A *S & F International Limited v Trans-Con Engineering Sdn Bhd* [1985] 1 MLJ 62 (refd)
Si & Si Sdn Bhd v Hazrabina Sdn Bhd [1996] 2 MLJ 509 (refd)
Tsoi Ping Kwan v Loh Lai Ngoh & Anor [1997] 3 MLJ 165 (refd)

B **Legislation referred to**
Companies Act 1965 s 218
Exchange Control Act 1953
Rules of the High Court 1980

C

Appeal from: Civil Suit No D6–22–338 of 2003 (High Court, Kuala Lumpur)

Zainur Zakaria (Philip MC Choong with him) (Philip Choong & Co) for the appellant.
D *Sulaiman Abdullah (K Goik with him) (Nasir, Kenzin & Tan) for the respondent.*

Mohd Ghazali JCA (delivering judgment of the court):

E

[1] On 5 March 2003 the appellant, a locally incorporated company named Bright Rims Manufacturing Sdn Bhd filed this instant action in the High Court, Kuala Lumpur, premised upon malicious prosecution, against the first respondent, a foreign company incorporated in Taiwan named Victor
F Taichung Machinery Works Co Ltd and which has a local address for service and the second respondent, a locally incorporated company named Victor Machinery (M) Sdn Bhd and which place of business bear the same address as the local address for service of the first respondent.

G **[2]** It is the appellant's claim that as a result of certain actions by the first and second respondents arising out of another civil suit, namely, Kuala Lumpur High Court Civil Suit No D5–22–425 of 1996 ('the D5 suit') wherein the appellant was named as one of the defendants, its reputation has been harmed, its credit seriously damaged and its business transactions
H hampered and hence has suffered loss and damage.

[3] In this instant action the appellant is claiming special damages totalling RM1,540,450 and the sum of RM6m as general damages and/or aggravated damages, interest and costs.

I

[4] On 21 March 2003, the appellant filed an ex parte application for Mareva injunction against the first respondent (encl 7) praying for the following orders:

(i) that the first respondent by themselves, their servants or agents or otherwise be restrained, and an injunction be granted restraining the first respondent from removing from jurisdiction, disposing of or otherwise dealing with in any manner a sum of RM1,540,450 within the jurisdiction until the inter partes hearing of the application on a date to be fixed or until further order;

(ii) that the costs of the application be borne by the first respondent.

[5] Enclosure 7 was heard by the learned judicial commissioner (JC) in the court below on an inter partes basis on 1 August 2003 and on 19 August 2003 was dismissed with costs. The appellant appealed to this court.

[6] We unanimously dismissed the appeal with costs and ordered the deposit to be remitted to the first respondent towards the account of taxed costs. The following are our reasons for doing so.

[7] It is the appellant's contention at the outset that the second respondent was at all material times the servant and/or agent and/or nominee of the first respondent in Malaysia and that the actions and/or omissions of the second respondent were in fact the actions and/or omissions of the first respondent; further and in the alternative, wherever the appellant attributes certain actions and/or omissions to the first respondent, it is its contention that these were also the acts and/or omissions of the second respondent.

[8] A perusal of the statement of claim filed by the appellant in this instant action would show the background and as to what transpired in the D5 suit.

THE D5 SUIT

[9] The D5 suit was filed on 25 June 1996. In that suit, the first respondent (as the plaintiff) sued the appellant and another for the sum of US$205,000 in respect of goods sold and delivered. The goods were two units of machinery ('the said machinery').

[10] In its defence, the appellant (as the first defendant) admitted that the said machinery were delivered but contended there was late delivery amounting to 44 days and that the said machinery were not in working order and were defective. The appellant (as the first defendant) then counterclaimed for the sum of RM990,000 as a result of loss in productivity it suffered as the said machinery could not be utilised.

[11] On 21 April 1997, Haidar Mohd Noor J (as he then was) awarded summary judgment in the D5 suit to the first respondent (as the plaintiff) for the sum of US$205,000 together with interest thereon at the rate of 8% per annum from 19 May 1995 until realisation and costs ('the said summary judgment'). Haidar Mohd Noor J also allowed a stay of execution of the said summary judgment until the hearing and disposal of the appellant's (as the first defendant) counterclaim.

[12] On 4 September 1998, Steve LK Shim J (as he then was) dismissed the appellant's (as the first defendant) counterclaim. On 30 September 1998, the appellant (as the first defendant) appealed to this court against the dismissal of its counterclaim ('the counterclaim appeal').

[13] Subsequently, on 3 February 1999, Steve LK Shim J granted a stay of execution on the said summary judgment until the hearing and disposal of the counterclaim appeal by this court ('the said stay of execution order').

[14] Meanwhile, on 21 September 1998 the first respondent (as the plaintiff) issued a notice under s 218 of the Companies Act 1965 to the appellant (as the first defendant).

[15] On 18 April 2000, this court allowed the counterclaim appeal by the appellant (as the first defendant) with costs here and below and ordered that the senior assistant registrar of the High Court assess damages, if any, suffered by the appellant (as the first defendant) premised upon a 14 days delay, as agreed, in delivery of the said machinery.

[16] On 3 July 2000, the Federal Court dismissed the first respondent's (as the plaintiff) application for leave to appeal.

THE INSTANT ACTION

[17] In this instant action, the appellant contend that the said stay of execution order (granted by Steve LK Shim J on 3 February 1999) 'extends to and encompasses' the assessment by the senior assistant registrar of the High Court of damages suffered by the appellant 'on the counterclaim and appeals until such matters are finally determined' and 'taxation of costs of the Court of Appeal and the High Court payable' by the first respondent to the appellant pursuant to said order of this court dated 18 April 2000.

[18] In furtherance to the above contention, the appellant aver that on 17 August 2000 the first respondent, by falsely representing to be the appellant's judgment creditor, maliciously and/or without reasonable or

probable cause and/or in abuse of process, presented a petition in the High Court at Kuala Lumpur (Companies Petition No D2–28–708 of 2000) ('the said petition') to wind up the appellant on the grounds that it was unable or deemed unable to pay its debts, namely, the judgment sum granted under the said summary judgment (granted by Haidar Mohd Noor J on 21 April 1997).

[19] The appellant contend that the first respondent was aware that at the time of presentation of the said petition, ie, on 17 August 2000, the said stay of execution order (granted by Steve LK Shim J on 3 February 1999) was subsisting, preventing all execution proceedings on the said summary judgment. Further, the senior assistant registrar of the High Court has yet to assess damages arising from the order of this court on the counterclaim appeal and that costs payable by the first respondent pursuant to the same order of this court have yet to be taxed or set off against the said summary judgment.

[20] The appellant further contend that the first respondent has not been candid in alleging in the said petition that the appellant was unable to pay its debts whereas it was well aware that the appellant 'is and was financially sound and well able to pay the judgment sum' in the said summary judgment. The first respondent itself disclosed in the said petition that the appellant has 'a paid up capital or credited as paid of RM9,791,176'.

[21] The appellant then pointed out that the first respondent has failed to withdraw the said petition notwithstanding that the said stay of execution order (granted by Steve LK Shim J on 3 February 1999) was brought to their attention in the appellant's affidavit filed in opposition to the said petition and also in an application to strike out the said petition. Further, the first respondent had also 'falsely and maliciously and without reasonable or probable cause and/or in abuse of process' caused the said petition to be advertised in newspapers.

[22] By reason of the presentation of the said petition the appellant's bank accounts were frozen and its credibility with its banks, suppliers and customers was seriously affected. Further, the presentation and advertisement of the said petition negated a sum of approximately RM1,490,450 expended by the appellant on advertisement of its products marketed over the period 1999 and 2000.

[23] The appellant then stated that on 16 October 2001 the High Court ordered that the said petition be struck off with costs payable to the appellant whereupon the whole proceedings were wholly determined in favour of the appellant. Subsequent to the striking out of the said petition, the first respondent maliciously and/or in abuse of legal process continued with execution proceedings on the said summary judgment in the D5 suit and that

A the first respondent and/or a servant of the second respondent purporting to act on behalf of first respondent caused a writ of seizure and sale dated 9 November 2001 ('the said writ of seizure and sale in the D5 suit') to be filed.

B **[24]** The appellant contend that the first respondent was not entitled to file and/or execute on the said writ of seizure and sale in the D5 suit as the said stay of execution order (granted by Steve LK Shim J on 3 February 1999) was still subsisting and that the assessment of damages on the counterclaim pursuant to the order of this court dated 18 April 2000 was not then finally C determined by the senior assistant registrar of the High Court.

[25] On 3 October 2001, the senior assistant registrar of the High Court assessed damages on the counterclaim to the value of RM472,214.40.

D

[26] On 5 October 2001, the first respondent filed an appeal to the judge in chambers against the assessment of damages by the senior assistant registrar. It is the contention of the appellant that the first respondent failed to take into account interest on the sum of RM472,214.40 at the rate of 8% E interest per annum from 18 April 2000 to 9 November 2001 amounting to RM59,098.50. Further, the costs of this court and the High Court payable by the first respondent to the appellant pursuant to the order of this court dated 18 April 2000 have not been taxed and set off against the judgment sum awarded in the said summary judgment.

F

[27] The appellant contend that the sum of RM709,979 appearing in the said writ of seizure and sale in the D5 suit is unlawful, exorbitant and or unconscionable; it was computed based on the judgment sum of US$205,000 on an erroneous exchange rate of US$1 to RM3.80 whereas the G exchange rate then was US$1 to RM2.50.

[28] The appellant also contend that in the said writ of seizure and sale in the D5 suit, the first respondent had 'deliberately suppressed' the fact that it is a foreign entity 'residing outside the schedule territories within the H meaning of the Exchange Control Act 1953'. Further, the first respondent is not registered as a foreign company in Malaysia and has no place of business within the jurisdiction of the High Court; its misrepresentation as to its place of business, viz, the same address as that of the second respondent's place of business 'is a deliberate attempt to circumvent the provisions of the Exchange I Control Act 1953 and the Rules of the High Court and is an abuse of legal process'.

[29] The appellant then pointed out that on 21 January 2002, the first respondent withdrew or abandoned the execution of the said writ of seizure

and sale in the D5 suit upon the appellant's undertaking to deposit the sum of RM709,979.40 with the appellant's then solicitors subject to certain conditions.

[30] Subsequently, on 20 February 2002, the appellant filed an application to strike out and/or set aside the said writ of seizure and sale in the D5 suit (encl 7 in the D5 suit).

[31] On 4 March 2002, the first respondent filed an application to amend the praecipe to the said writ of seizure and sale in the D5 suit to take into account the following:

(a) the decision of the learned judge of the High Court in reducing the award of damages on the appellant's counterclaim in the D5 suit to RM34,000;

(b) the change in the address of the first respondent to an address out of the jurisdiction; and

(c) the letter of approval from the controller of foreign exchange.

[32] On 30 May 2002, the appellant's application to strike out or set aside the said writ of seizure and sale in the D5 suit (encl 7) was dismissed by the senior assistant registrar of the High Court with costs and on the same day, the senior assistant registrar allowed the first respondent's application to amend the said writ of seizure and sale in the D5 suit (encl 11).

[33] The appellant appealed against both decisions to the learned judge of the High Court. On 15 October 2002, the learned judge of the High Court dismissed both appeals. The appellant then appealed to this court and these appeals in relation to encls (7) and (11) in the D5 suit are still pending.

[34] Meanwhile, the first respondent and/or a servant of the second respondent filed an amended writ of seizure and sale in the D5 suit dated 12 June 2002 ('the amended writ of sale and seizure in the D5 suit') and subsequently continued with execution proceedings on the said summary judgment against the appellant. In relation to this, the appellant contend that the first respondent was not entitled to file and/or execute the amended writ of seizure and sale in the D5 suit for the following reasons:

(a) the said stay of execution order (dated 3 February 1999 granted by Steve Shim J (as he was then)) was still subsisting, preventing the first respondent from carrying out all execution proceedings on the judgment sum obtained under the said summary judgment;

(b) the assessment of damages on the appellant's counterclaim pursuant to the order of this court dated 18 April 2000 have not been finally determined; further, on 29 March 2002, the learned judge of the High Court reduced the award of damages on the counterclaim to the value of RM34,000 and on 29 April 2002, the appellant appealed to this court against that decision;

(c) the costs of this court and the High Court payable by the first respondent pursuant to the order of this court dated 18 April 2000 have not been taxed and set off against the judgment sum obtained under the said summary judgment;

(d) the sums claimed by the first respondent in the said amended writ of seizure and sale in the D5 suit is unlawful, exorbitant and/or unconscionable; the said sum of RM709,979 was based on the judgment sum of US$205,000, obtained under the said summary judgment, converted to RM779,000 at the exchange rate of US$1 to RM3.80 at the date of filing of the amended writ of seizure and sale in the D5 suit on 12 June 2002 as opposed to the rate of exchange of US$1 to RM2.50 as at the date of the summary judgment on 21 April 1997; on the basis of the exchange rate of RM2.50 on 21 April 1997, the judgment sum of US$205,000 obtained under the said summary judgment amounts to RM512,500; and

(e) the said writ of seizure and sale in the D5 suit was suspended or abandoned by the first respondent on 21 January 2002; the appellant contend that there is no legal basis for the first respondent to amend the said writ of sale and seizure in the D5 suit which, having been abandoned, could not be reissued or amended.

[35] Further and/or alternatively, the first respondent and/or the second respondent, purporting to act on behalf of the first respondent continued with the abuse of process and/or malicious prosecution of the said amended writ of seizure and sale in the D5 suit. On 30 October 2002, the first respondent through its solicitors together with the bailiff of the High Court, proceeded to carry out execution of the said amended writ of seizure and sale in the D5 suit at the appellant's business premise. In relation to this, the appellant pointed out the following:

(a) on 30 October 2000, the learned judge of the High Court granted a stay of execution of the said amended writ of seizure and sale in the D5 suit up to the hearing and disposal of the appellant's application for stay and further ordered that the sum of RM790,087.60 be deposited by the appellant into court;

(b) on 11 November 2002, the appellant deposited the sum of RM790,087.60 into court;

(c) on 21 November 2002, the learned judge of the High Court in the said action dismissed the appellant's application for stay with costs; and

(d) on 27 November 2002, this court allowed a stay of all execution on the judgment sum obtained under the said summary judgment to the extent of RM470,000 pending disposal of the appeal to this court on the question of damages on the appellant's counterclaim (Civil Appeal No W-02–335 of 2002); this court further ordered costs of and occasioned by the application before this court for stay be costs in Civil Appeal No W-02–335 of 2002.

[36] By reason of the matters aforesaid, the appellant contend that its reputation 'has been harmed, its credit seriously damaged, its business transaction hampered and it has suffered loss and damage'.

[37] The appellant further contend that its turnover and profits for the year ending 31 December 2000 declined significantly. Its turnover in trading of RM78,620,000 and the net profit of RM19,800,000 after tax as at 31 December 1999 fell to a turnover of RM50,258,000 and a net profit of RM8,342,000 as at 31 December 2000. It has also suffered damages totalling RM1,540,450, namely:

(a) legal costs in opposing the said petition and in attending to the notice of motion to set aside the said petition which amounted to RM50,000; and

(b) costs of advertisement incurred over the period 1999 and 2000 which were 'negated by the malicious presentation and publication' of the said petition which amounted to RM1,490,450.

[38] Thus, what is clear is that in this instant action which is premised upon malicious prosecution, the appellant (as the plaintiff) is claiming special damages totalling RM1,540,450 and the sum of RM6m as general damages and/or aggravated damages, interest and costs. The first and second respondents filed a joint defence dated 26 May 2003 disputing the appellant's claim. The instant action has yet to be heard.

MAREVA INJUNCTION (ENCLOSURE 7)

[39] On 21 March 2003, the appellant filed encl 7, viz, the ex parte application in this instant action for a Mareva injunction praying for the following orders:

(i) that the first respondent by themselves, their servants or agents or otherwise be restrained, and an injunction be granted restraining the first respondent from removing from jurisdiction, disposing of or otherwise dealing with in any manner a sum of RM1,540,450 within the jurisdiction until the inter-partes hearing of encl 7 on a date to be fixed or until further order; and

(ii) that the costs of the application be borne by the first respondent.

[40] Enclosure 7 came up for hearing before the learned JC on 1 August 2003 and it was heard on an inter partes basis. It was then adjourned for decision to 19 August 2003. On 19 August 2003, the learned JC dismissed the application with costs. The appellant appealed to this court. As mentioned earlier, it was our unanimous decision that the appeal be dismissed with costs.

DECISION OF THE HIGH COURT

[41] In her grounds of decision, the learned JC, in relation to Mareva injunctions, made reference to *Creative Furnishing Sdn Bhd v Wong Koi* [1989] 2 MLJ 153 and *Tsoi Ping Kwan v Loh Lai Ngoh & Anor* [1997] 3 MLJ 165. She then said that in applying for a Mareva injunction an applicant must show to the court the following:

(i) that he had a good arguable case;

(ii) that the party against whom the injunction is applied for has assets within the jurisdiction; and

(iii) that there was a real risk of the assets being dissipated or removed before judgment.

[42] The learned JC noted that the appellant's claim against the first respondent was based upon malicious prosecution and in relation to this referred to *QIW Retailers Ltd v Felview Pty Ltd & Anor* (1989) 7 ACLC 510, a decision of the Supreme Court of Queensland. In that case, the plaintiff brought an action against the defendants for damages for malicious prosecution and for abuse of process. It was held therein that in an action for malicious prosecution, a plaintiff has to prove the following:

(i) that proceedings have been maliciously instituted or continued against him;

(ii) that they have terminated in his favour;

(iii) that the proceedings are so brought or continued without reasonable and probable cause; and

(iv) that some injury or damage has been sustained by him in consequence. A

[43] In her grounds of decision, the learned JC was of the view that the appellant failed to show the following:

(i) that the proceedings, viz, the said petition and the said writ of seizure and sale in the D5 suit was decided in the appellant's favour; B

(ii) that the first respondent brought or continued the proceedings in the D5 suit without reasonable and probable cause; and

(iii) that first respondent has maliciously instituted the proceedings. C

[44] In relation to the above, the learned JC noted that it was not disputed that said petition was struck off on 16 October 2001 but there is nothing to show that it was struck off on the ground that the said stay of execution order granted by Steve LK Shim J on 3 February 1999 was still in force. As for the proceedings itself, ie, the said petition and the said writ of seizure and sale in the D5 suit, she was of the view that the first respondent was entitled to pursue the same on the basis that the said stay of execution abates when this court disposed of the counterclaim appeal by the appellant on 18 April 2000. D E

[45] The learned JC was also of the view that notwithstanding that the first respondent was a foreign company, the appellant has failed to show there was a real risk of the first respondent's assets being dissipated or removed before this instant action is disposed of. F

[46] The learned JC then concluded that the application for Mareva injunction by the appellant was an abuse of process of the court and that it was more akin to an application for security for costs and hence dismissed the same. G

JUDGMENT OF THIS COURT

[47] It would be appropriate to mention here that in his submission at the hearing of this appeal, learned counsel for the first respondent informed us that the appellant's appeal against the decision of the learned JC, which reduced the damages awarded by the senior assistant registrar from RM472,214 to RM34,000 for the loss suffered by the appellant on the 14 days delay in delivery, viz, the counterclaim, has been dismissed by this court on 23 June 2004. H I

[48] In *S & F International Limited v Trans-Con Engineering Sdn Bhd* [1985] 1 MLJ 62, the Federal Court held that the discretion whether or not to grant an interlocutory injunction is vested in the High Court judge and

not the appellate court whose function initially is one of review only and it will not overrule the decision of the judge at first instance unless, broadly speaking, he has made an error of law or misconceived the facts, and except in those circumstances it must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently. In delivering the judgment of the Federal Court, Abdoolcader FJ said (at p 64):

> It might perhaps be convenient at this stage to concisely perpend the principles and policy underlying a Mareva order elucidated in a chain of related cases of which we need only refer to three. In *PCW (Underwriting Agencies) Ltd v Dixon & Anor* [1983] 2 All ER158 (CA); [1983] 2 All ER 697 which sets out the policy underlying the Mareva jurisdiction, it was held that the sole purpose of a Mareva injunction was to prevent a plaintiff being cheated out of the proceeds of an action, should he be successful, by a defendant transferring his assets abroad or dissipating his assets within the jurisdiction, and that the remedy was not intended to give a plaintiff priority over those assets, or to prevent a defendant from paying his debts as they fell due, or to punish him for his alleged misdeeds, or to enable a plaintiff to exert pressure on him to settle an action. This decision of Lloyd J, went on appeal to the Court of Appeal ([1983] 2 All ER 697) which however did not deliver a judgment but by consent allowed the appeal and varied the judge's order, but the principles enunciated by Lloyd J, were unaffected by the consensual variation made in the light of the factual circumstances of that case. The English Court of Appeal has also held in *Campbell Mussells & Ors v Thompson & Anor* The Times dated 30 May 1984, that a Mareva injunction was never intended to put a plaintiff in the position of a secured creditor and every case had to be dealt with on its own merits.
>
> Mustill J, held in *Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft mbH & Co KG* [1984] 1 All ER 398 on appeal to CA [1984] 1 All ER 413; [1983] 1 WLR 1412 that: (1) Before a Mareva injunction will be granted, a plaintiff must show first that he has a good arguable case, which is more than being barely capable of serious argument, but not necessarily one that the judge believes has got more than fifty per cent chance of success; (2) Before such relief is granted the plaintiff must secondly show that there is a risk that assets will be dissipated: he must demonstrate this by solid evidence, eg that the defendant's previous actions show his probity is not to be relied upon or that the corporate structure of the defendant infers that it is not to be relied upon, but mere proof that the defendant is incorporated abroad will not suffice; (3) In reaching its conclusion, the court should take into account the defendant's evidence as well as the plaintiffs. The English Court of Appeal in dismissing an appeal by the plaintiffs in that case ([1983] 1 WLR 1412; [1984] 1 All ER at p 413) restated the principles of Mareva applications and held that the jurisdiction to grant Mareva injunctions was exercisable in cases where it appeared just and convenient to the court to grant the injunction, and the plaintiff had, inter alia, to show, on the evidence as a whole, that there was at least a good arguable case that he would succeed at the trial, and that a refusal of an injunction would involve a real risk that a judgment or award in his favour would remain unsatisfied because of the defendant's removal of assets from the jurisdiction or dissipation of assets within the jurisdiction.

We should perhaps also reiterate and stress the point that the discretion whether or not to grant an interlocutory injunction is vested in the High Court judge and not the appellate court whose function initially is one of review only, and it will not overrule the decision of the judge at first instance unless, broadly speaking, he has made an error of law or misconceived the facts, and except in those circumstances it must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently: *Duport Steels Ltd v Sirs* [1980] 1 WLR 142; *Hadmor Productions Ltd v Hamilton* [1983] AC 191, 220; *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] 1 AC 130. These decisions of the House of Lords were referred to and applied by the English Court of Appeal in *Ninemia Maritime Corporation* [1983] 1 WLR at p 1421; [1984] 1 All ER 413 at p 418 where Kerr LJ, in delivering the judgment of the court stated that recent decisions of the House have emphasised the importance of appellate courts resisting the temptation to interfere with the exercise of judicial discretions other than in limited circumstances.

[49] We would find it appropriate that the following chronology of events be reiterated in dealing with this appeal, namely:

(i) on 21 April 1997, Haidar Mohd Noor J awarded summary judgment in the D5 suit to the first respondent (as the plaintiff); he also allowed a stay of execution of the said summary judgment until the hearing and disposal of the appellant's (as the first defendant) counterclaim by the High Court;

(ii) on 4 September 1998, Steve LK Shim J dismissed the appellant's (as the first defendant) counterclaim;

(iii) on 3 February 1999, Steve LK Shim J granted a stay of execution on the said summary judgment until the disposal by the Court of Appeal of the appellant's (as the first defendant) counterclaim appeal;

(iv) on 18 April 2000 this court allowed the counterclaim appeal and ordered the High Court to assess damages premised upon a 14 days delay in delivery of the said machinery; this event, to us, would denote that the stay of execution order granted on 3 February 1999 by Steve LK Shim J abates or has lapsed under the circumstances;

(v) on 17 August 2000 the first respondent presented the said petition to wind up the appellant premised upon the summary judgment it obtained against the appellant;

(vi) on 16 October 2001, premised upon a motion filed by the appellant to strike out the said petition, Zainun Ali J ordered that the appellant's motion be allowed with costs and that the said petition 'be struck off' (p 543 of the appeal record) which, to us, would denote that the said

A petition was not heard on its merits; we would like to mention here what we have not been enlightened as to reasons why the said petition was struck off by Zainun Ali J.

B **[50]** At the hearing of this appeal, learned counsel for the appellant concede that the stay of execution order granted on 3 February 1999 by Steve LK Shim J 'dissolved' when this court, on 18 April 2000, allowed the counterclaim appeal. Under these circumstances, we are of the view that the first respondent had every right to file the said petition on 17 August 2000 C to wind up the appellant based upon the said summary judgment awarded against the appellant by Haidar Mohd Noor J on 21 April 1997. The said summary judgment was clearly a final judgment. As such we cannot fathom the stand of the appellant as per its memorandum of appeal that the learned JC failed to appreciate that the appellant has a strong arguable case to claim D for damages against the first respondent following the 'dismissal' of the said petition. The order of Zainun Ali J clearly state that the said petition was 'struck off' and not 'dismissed'.

[51] In furtherance to the above, we cannot see any merits in the ground E advanced by the appellant in its memorandum of appeal that the learned JC failed to consider adequately that the said petition, even if subsequently dismissed as being ill-founded, could damage the reputation of the appellant as a solvent company. We do appreciate that the appellant would be entitled to damages if it can prove at the trial of the instant action that there was F indeed malicious prosecution on the part of the first respondent in presenting the said petition, but until the instant action is heard on its merits, we cannot see how the learned JC can determine at this interlocutory stage that the presentation of the said petition was from its very nature calculated to injure the credit of the appellant thus entitling it damages for pecuniary loss or G special damages or loss of business.

[52] It cannot be disputed that the appellant has every right to file this instant action premised on malicious prosecution and in relation to this we are of the view that the appellant took the correct approach as has been H established from authorities, namely, that any action for damages against a petitioner, whose petition for winding up has been struck out can be brought by an entirely separate suit founded on a tort of malicious prosecution (see *Si & Si Sdn Bhd v Hazrabina Sdn Bhd* [1996] 2 MLJ 509 at p 514). However, the issue of how much loss has been suffered can only be determined at the I trial. In this application for Mareva injunction, the sum that the appellant is asking the court to injunct is RM1,540,450. With regards to this amount, we would agree with the view of the learned JC and also the argument advanced by learned counsel for the first respondent at this appeal that the appellant failed to produce any evidence at all to prove that they had suffered loss of

RM1,490,450, ie, the purported expenses for advertisements and its legal costs in opposing the said petition. As such, it would only tantamount to being a bare allegation. The fact that this loss is claimed as special damages would suggest that the appellant should have all the necessary evidence to prove this amount but they failed to illustrate this when they pursued this application. Further, we would also agree with the argument canvassed by learned counsel for the first respondent that the appellant has no right to unilaterally claim RM50,000 as their legal cost when this cost had yet to be taxed by the court.

[53] The appellant has enlightened us as to the fact that the judgment sum of USD205,000 in the said summary judgment is secured and paid by the appellant in the following manner:

(i) a sum of RM709,087.60 was paid by the appellant to M/s Vicknaraj, RD Ratnam, Rajesh Kumar & Associates, the former solicitors for the appellant on 23 January 2003 and that out of the said sum of RM709,087.60, a sum of RM409,979.40 was paid to solicitors for the first respondent;

(ii) the remaining sum of RM300,000 was to be deposited in the joint account of the appellant's former solicitors and the first respondent's solicitors;

(iii) on 11 November 2002, the appellant deposited the balance of the judgment sum of RM790,087.60 (a sum of RM470,087.60 and the sum of RM300,000 deposited with the appellant's former solicitors) into court.

[54] In relation to the above, the appellant argued that unless restrained there is a real danger that the first respondent, being a foreign company, will remove from the jurisdiction the said judgment sum and this would render nugatory any order which the court may order against the first respondent. With respect, we find that the appellant has not shown that there is a risk that the assets of the first respondent, including the judgment sum will be dissipated.

[55] In relation to the above issue, learned counsel for the first respondent pointed out that the instant action is not bona fide and an abuse of the court process. Counsel averred that the appellant only commenced the instant action when it realised that the first respondent was entitled to withdraw a sum of RM354,087.60 from the money deposited in court when this court, on 27 November 2002, only allowed stay for an amount of RM470,000. Counsel then argued that the real reason why the appellant filed the instant action is to try to prevent the first respondent from enjoying the fruits of its litigation, ie, the said summary judgment. The appellant then tried to stop

A the first respondent from withdrawing the said sum of RM354,087.60 from the court by filing the instant action and the application for Mareva injunction. Counsel submitted this can be clearly seen as the instant action was only filed on 5 February 2003, ie, not long after the above-mentioned decision of this court on 27 November 2002. Counsel then averred that if the B appellant really believe that it has a strong case for malicious prosecution against the first respondent, it would have filed this action immediately after the said petition was struck off by the court on 16 October 2001.

C **[56]** We had carefully perused the appeal record and the grounds of decision of the learned JC and found that she had taken into consideration all the facts and the legal principles involved in an application for Mareva injunction. She had weighed all relevant factors and came to the conclusion that the balance of convenience lay in favour of refusing the Mareva injunction. We are of the view she had exercised her discretion judiciously D and in accordance with settled principles in dismissing this application for Mareva injunction. We cannot find anything to suggest that she has committed an error of law or misconceived the facts. As such we have no reason to interfere.

E **[57]** For the reasons above we dismissed the appeal with costs. The orders made by the learned JC were affirmed. We also ordered that the deposit be remitted to the first respondent towards the account of taxed costs.

F **[58]** This was a unanimous decision. My learned brother Denis Ong Jiew Fook JCA has perused this judgment in draft and has expressed his concurrence with the reasons herein. Our learned brother Arifin Jaka JCA has since retired when this judgment was prepared and he did not have the benefit of reading it.

G *Appeal dismissed with costs.*

Reported by Navit Kaur Randhawa

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